Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rulemaking of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rulemaking of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18

OPPOSITION OF THE 800 MHz TRANSITION ADMINISTRATOR TO PETITION FOR PARTIAL STAY OF DECISION

The 800 MHz Transition Administrator ("TA") hereby submits its Opposition to the Petition for Partial Stay of Decision submitted on February 7, 2005 by Mobile Relay Associates ("MRA") and Skitronics, LLC ("Skitronics") (collectively "Petitioners").[1] The Petitioners request a stay of the reconfiguration of the 800 MHz band pending Commission action on their

[1] *See Improving Public Safety Communications in the 800 MHz Band*, Petition for Partial Stay of Decision, WT Docket No. 02-55 (filed Feb. 7, 2005) ("*Petition*").

"Emergency Motion for Removal of BearingPoint, Inc. from Transition Administrator Team and Cessation of Transition Process Pending Announcement of a Replacement Administrator," ("Motion") which they filed on the same day.[2] Because grant of a stay would delay the critical reconfiguration of the 800 MHz band, the TA requests that the Commission deny the stay as contrary to the public interest.

The standard by which stay requests are considered is well settled law.[3] Consistent with this precedent, and to support a stay here, the Petitioners must have shown: (1) that they will likely prevail on the merits of their Motion to remove BearingPoint, Inc. ("BearingPoint"); (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors granting a stay. The Petitioners have met none of these tests.

A Stay of These Proceedings Would Harm the Public Interest and Other Parties

In the Order denying the previous stay request submitted by Petitioners, the Commission noted that a grant of a stay of the reconfiguration of the 800 MHz band would "both harm other parties and be contrary to the public interest because it would prevent the Commission from achieving its core goal of abating interference to public safety and CII communications."[4] Petitioners have cited no subsequent event that would provide a basis for the Commission to alter this conclusion.

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[2] *See Improving Public Safety Communications in the 800 MHz Band*, Emergency Motion for Removal of BearingPoint, Inc. From Transition Administrator Team and Cessation of Transition Process Pending Announcement of a Replacement Administrator, WT Docket No. 02-55 (filed Feb. 7, 2005) ("*Motion*").

[3] *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977).

[4] *See Improving Public Safety Communications in the 800 MHz Band*, Order, WT Docket No. 02-55, DA 05-82 at 8 (¶16) (rel. Jan. 14, 2005) ("*Order*").

Subsequent events, indeed, have demonstrated the importance of continuing the reconfiguration process expeditiously and without interruption. Recently, the TA has submitted to the Commission its proposed "Regional Prioritization Plan" ("RPP"). The RPP established June 27, 2005 as the start date for the commencement of reconfiguration of the 800 MHz band. The TA also has identified April 15, 2005—just two months away—as the date by which it anticipates accepting cost estimates from licensees in the first reconfiguration wave and from multi-wave licensees to support reconfiguration planning activities. The TA has further determined that, in order to meet the schedule established in the RPP, it must undertake immediate activity on three critical paths—frequency planning, process and policy development, and outreach and education.[5]

A stay would prevent the TA from fulfilling these responsibilities and inevitably delay the acceptance of cost estimates and commencement of reconfiguration. This delay would cause a "domino effect" throughout the schedule established by the TA for band reconfiguration, ultimately delaying completion of band reconfiguration and negatively impacting every NPSPAC region and all public safety, Critical Infrastructure Industry ("CII"), Business, Industrial, and Land Transportation ("B/ILT"), and Specialized Mobile Radio ("SMR") licensees involved in the reconfiguration process.

Here, as in their prior request to stay these proceedings, the Petitioners rely upon the interim "Best Practices" adopted in the *800 MHz Order*[6] to mitigate any harm to other parties during the pendency of a stay.[7] The Commission clearly addressed the failure of this reasoning

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[5] *See Improving Public Safety Communications in the 800 MHz Band*, Regional Prioritization Plan of the 800 MHz Transition Administrator, WT Docket No. 02-55 (filed Jan. 31, 2005).

[6] *See Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969 (2004) ("*800 MHz Order*").

[7] *See Petition* at 5.

in its Order, noting, most importantly, that the Best Practices guidelines address interference after it occurs and that if a stay were granted "there would be palpable—even life-threatening—harm to both public safety agencies and to the public…."[8]

The Petitioners attempt to distinguish the harm that might occur from a grant of a stay pending a Commission decision on its Motion from the harm that would have resulted from a grant of their earlier stay request by asserting that the stay they now request would be of shorter duration—perhaps only two to three months.[9] As an initial matter, the duration of any stay pending further proceedings is inherently speculative. In any case, any stay of these proceedings will delay band reconfiguration and harm the public interest.

Petitioners Have Not Established That They Will Suffer Irreparable Injury

The Petitioners state that they will suffer irreparable harm in the absence of a stay since they will be required to participate in the reconfiguration process pending disposition of their Motion. In particular, they note that MRA "is facing immediate irreparable harm" because the TA's RPP has named the Colorado NPSPAC region as "the second NPSPAC region in the United States…to undergo the forced migration."[10] There is no comparable statement made by Petitioners concerning Skitronics, whose 800 MHz licenses are not required to reconfigure.

Petitioners apparently have misinterpreted the Regional Prioritization Plan. The TA has not, as Petitioners state, scheduled the Colorado NPSPAC region (Region 7) to be the second NPSPAC region reconfigured in the United States. The TA has scheduled Region 7 to be included in Wave 1 of reconfiguration, along with 13 other full NPSPAC regions and one partial region (Region 54). These areas, which are scheduled to begin reconfiguration on the same date

[8] *See Order* at 8 (¶16).

[9] *See Petition* at 5.

[10] *Id.* at 4.

as Region 7, include the Northeastern United States, Northern California, New England, Oregon, and parts of Illinois and Indiana, among others. In addition, large multi-wave systems which have any footprint in any of these NPSPAC regions will also commence reconfiguration on the same schedule as Region 7.[11] Accordingly, among other things, Petitioners have based their claim to irreparable injury on a mistaken factual premise.

Many parties responded to the TA's request for comment regarding their preferences in scheduling band reconfiguration. Most parties expressed concern in their comments to us that their regions not be delayed in reconfiguration. As described in the RPP, to the extent possible consistent with the goals of prioritization based on interference and population set forth in the *800 MHz Order* and sound spectrum and program planning, the TA attempted to accommodate the preferences that these parties expressed. The TA was not able to accommodate all preferences, but minimized the delay in reconfiguration in any particular region by spacing the start dates for the Waves three months apart.

The TA understands from the Petition that MRA prefers that commencement of reconfiguration of Region 7 be delayed to the extent possible. MRA did not express this preference in the letter that it sent to the TA (which is a matter of public record in WT Docket No. 02-55) prior to the submission of the RPP. Given the structure of the RPP, the maximum delay in the start date for Region 7 (and thus, the maximum impact on MRA) would be six months (i.e., until the start date for Wave 3, the last Wave for non-border regions).[12]

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[11] The Petitioners' confusion appears to arise from the tabular form of the reconfiguration waves presented on page 24 of the RPP. The TA there presented, in numerical order, a listing of the NPSPAC regions that are scheduled in each Wave. The TA did not intend to signify by that tabular presentation that reconfiguration within each Wave would proceed according to the numerical ordering of the NPSPAC regions.

[12] Region 7 was scheduled in Wave 1 because of the compelling and documented reports of interference to public safety communications occurring in that region and in particular in the City of Denver. *See, e.g., Improving Public Safety Communications in the 800 MHz Band*, Ex Parte Letter of City and County of Denver, Colorado, WT Docket

Beyond these considerations, the Petitioners have misinterpreted the TA's role in administering band reconfiguration. In this respect, the RPP must be reviewed and approved by the Commission. Indeed, all of the TA's actions in administering band reconfiguration are subject to Commission review. And, the Commission's review of the RPP is not complete. Accordingly, MRA has the opportunity to provide either the TA or the Commission with documentary evidence regarding the harm it will suffer from the commencement of Wave 1 reconfiguration six months earlier than the last possible starting date given the RPP's structure. Any such evidence must be weighed and balanced with the impact of delay on other licensees in Region 7.

In their Motion, the Petitioners also state they may suffer harm from the TA's consideration of their letter requests submitted to the TA on January 20, 2005.[13] Those letters ask the TA "in making any recommendation or proposed rebanding within 800 MHz, ensure that such proposed rebanding plan will accommodate the relocation of [MRA's/Skitronics's] 800 MHz spectrum into either the new ESMR band, or the band immediately adjacent to the new ESMR band, as [MRA/Skitronics] may elect in the future depending upon the outcome of the pending court case."[14] Other than noting that frequency planning is a critical path for the commencement of reconfiguration, the RPP did not address the assignment of frequencies within the reconfiguration process. It is axiomatic, however, that all licensees, including MRA and Skitronics, must be provided by the TA with the options that are determined by the Commission as they may be impacted by the decision of the D.C. Circuit in *Mobile Relay Associates v.*

No. 02-55 (filed Mar. 19, 2004). The TA concluded on the basis of the information that had been provided prior to submission of the RPP that scheduling Region 7 in Wave 1 was consistent with its mandate from the Commission.

[13] *See Motion* at 4.

[14] *See Letters from MRA and Skitronics to the 800 MHz TA* (Jan. 20, 2005) available in WT Docket No. 02-55.

FCC.[15] This is simply not a matter of TA discretion. Accordingly, we do not see how Petitioners can suffer the claimed harm.

Petitioners Are Not Likely to Prevail on the Merits of Their Motion

Finally, the Petitioners are not likely to prevail on the merits of their request to remove BearingPoint. Although this issue will be addressed more fully in a response to the Motion, the TA notes that BearingPoint clearly disclosed its existing commercial relationship with Nextel, including, *inter alia*, the fact that it had multiple contracts with Nextel for ongoing enterprise projects and that it had submitted a proposal to be considered a Nextel "prime vendor."

Petitioners plainly have not shown that they are likely to prevail on their Motion to have BearingPoint removed. Petitioners' sole argument is that "Bearingpoint's continued presence in the Transition Administration position violates Canons 4A and 4D of the ABA Model Code of Judicial Conduct."[16] However, as the TA will discuss in greater detail in its response to the Petitioners' Motion, the Code of Judicial Conduct is not applicable. The TA is not a judge. Rather, the Commission has determined that the TA will "serve both a ministerial role and a function similar to a special master."[17] Therefore, contrary to Petitioners' assertion, the mere fact that BearingPoint has an ongoing business relationship with Nextel does not make it "virtually certain" that Petitioners will "prevail in having Bearingpoint removed."[18]

The TA has consistently acknowledged the importance of ensuring fairness and impartiality in its processes for all parties. The premise of TA independence has been the keystone in the development of the TA's processes and programs. For its part, BearingPoint has

[15] *See Mobile Relay Associates v. FCC*, No. 04-1413 (D.C. Cir. filed Dec. 6, 2004).

[16] *Petition* at 3.

[17] *800 MHz Order,* 19 FCC Rcd at 15071 (¶149).

[18] *Petition* at 3-4.

developed and implemented a "Special Implementation Plan" ("SIP") to provide and maintain appropriate separation between BearingPoint TA members and BearingPoint's Nextel commercial account. BearingPoint's SIP was all but ignored by Petitioners. It provides for separation in communications, separation in document management, restrictions on contacts with Nextel after departing the TA, and restrictions in access, reporting, and responsibility. The SIP also relies upon checks and balances between the three TA team members and implements an independence management conflict reporting and resolution process that is subject to the oversight and authority of the TA's General Counsel, who is not a BearingPoint employee. As a large organization experienced in handling large program management challenges, BearingPoint is experienced in implementing and maintaining organizational separation as described in its SIP.

In addition, the SIP requires compliance by BearingPoint personnel with the TA's Independence Management Plan and Code of Conduct and provides for disciplinary actions for any BearingPoint personnel found in violation. The TA's Independence Management Plan and Code of Conduct will be submitted to the Commission as a public document. Among other things, the Independence Management Plan integrates all three TA team members in the organizational and leadership structure of the TA and ensures the independence of the TA through peer review, consultation, and action among the TA members. In this respect, the alternative dispute resolution ("ADR") process that is contemplated by the *800 MHz Order* will be designed, managed, and maintained under the auspices of Squire, Sanders & Dempsey L.L.P., the TA's General Counsel. The legal and functional structure of the TA, its Independence Management Plan, its Code of Conduct, and BearingPoint's Special Implementation Plan have all been designed to ensure the impartiality of the TA's processes, while preserving the TA's

ability to benefit from the collective expertise and resources of all TA team members. In addition, the TA has utilized—and will continue to employ—open and transparent processes to the maximum extent possible consistent with its responsibilities. The TA is mindful of the need for impartiality in its processes and is confident that these measures and processes will ensure that impartiality.

The TA respectfully requests that the Commission expeditiously deny the Petition for Partial Stay of Decision.

Respectfully submitted,

THE 800 MHz TRANSITION ADMINISTRATOR

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February 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Opposition of 800 MHz Transition Administrator to Petition For Partial Stay of Decision** was mailed this 14th day of February, 2005 by U.S. First Class Mail to the following:

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